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those cases render it quite palpable that scarcely another advance remains to be made in order to abrogate that remedy absolutely and reinstate and restrict the admiralty powers of the judiciary in respect to those credits, in subordination to the rule of the common law as that was administered under the English jurisprudence at the time of the adoption of the United States Constitution.

It is my province to accept and pursue the law as declared by the Supreme Court; and in my opinion the rule established by that tribunal in those cases determines that the claim put forth in this action either for building, or constructing, or outfitting, or providing materials, supplies, labor, rigging, or ship stores necessary to render this vessel seaworthy and fit for navigation at sea, is not within the jurisdiction of the court, and accordingly the libel must be dismissed, with costs.

The amount in demand being sufficient to authorize an appeal of the case to the court of last resort, I put the decision specifically upon the question of jurisdiction, that being directly involved, and being of high practical moment to the mercantile, manufacturing and shipping interest of the country, and shall forbear discussing those other features in the case bearing strongly against the adequacy of the pleadings and proofs to sustain the action in this form, if the cases of *Pratt vs. Reid*, and the *Ferry Company of Boston, claimants of the Jefferson vs. Beers*, had interposed no legal impediment in the suit.

Decree accordingly.

In the Supreme Court of Michigan.

THE AMERICAN TRANSPORTATION CO. PL'FFS IN ERROR vs. MOORE, FOOTE
AND CO. DEF'TS IN ERROR.

1. Where an action was brought for the non-delivery of certain goods entrusted to the owners of the propeller Spaulding, which were put on board at Buffalo to be transported to Detroit, and which were accidentally burned without negligence, it was held that, inasmuch as the loss occurred on a lake vessel engaged in commerce within the jurisdiction of Congress, the owners of the propeller were

exonerated from liability under the act of March 8, 1851, passed to limit the liability of ship owners.

2. A limitation alleged by a carrier as one of the terms of his contract, is a question of fact, and must be shown affirmatively before a jury.
3. The history of maritime legislation in England and in this country.
4. The history of maritime legislation as applied to the commerce of the great lakes.
5. Lake commerce is, in its nature, maritime, and as such has been recognized by the Federal Government.

Moore, Foote & Co., sued the American Transportation Company for the non-delivery of certain goods entrusted to the company, to be transported from New York to Detroit. The goods were accidentally burned on board of the propeller Spaulding, belonging to the company, having been put on board at Buffalo to be carried to Detroit. The grounds of defence to the action were, *first*, that by the original contract of carriage, the owner of the goods was to bear all risks of fire during the whole route; and *second*, that, inasmuch as the loss occurred upon a lake vessel engaged in commerce within the jurisdiction of Congress, the owners of the vessel were exonerated from liability, under the act of Congress of 1851, passed to limit the liability of ship owners. Upon the question of liability under the original contract, the court was asked to charge in several different particulars, involving a construction of the law as applicable to facts attending this agreement and the subsequent shipment, and exceptions were taken to the charges given. Upon the question arising under the act of Congress, the court charged the jury that lake commerce did not come within the intention of the statute, but must be considered as 'inland,' within the exception of the act. Judgment was given for the plaintiffs, and the case was brought up on writ of error and exceptions for review.

The opinion of the court was delivered by

CAMPBELL, J.—The errors assigned in this case arise upon the action of the court below in charging and refusing to charge.

The requests, made by the defendant below (who is plaintiff in error,) number 1, 2 and 3, were properly refused by the courts. Whether the merchant in New York, shipping goods to Moore Foote & Co., had authority to make contracts for shipment on dif-

ferent terms from those ordinarily adopted by common carriers, was a question of fact, and the court could not properly be asked to make any charge which should absolutely dispose of a fact in controversy. The whole depended on the terms of agency.

We think the 2d instruction asked by the plaintiff below, and given by the court, is too broad and unqualified, and would naturally tend to mislead a jury. It was taken literally from the opinion of the United States Supreme Court in the case of the *New Jersey Steam Navigation Co. vs. Merchants' Bank*, 6 How. R. 344. But as it appears there, it is considerably qualified by the context. And it was propounded there as an independent abstract legal proposition, requiring no explanation. While it is true that it devolves upon a carrier to show affirmatively the terms of any contract which lessens his common law liability, yet that fact is to be proved like any other, by any pertinent evidence. If in writing, the writing must be shown; but if by parol, there is no rule which requires different proof from that which would establish any other contract. It does not matter that the evidence is conflicting, for in civil cases the jury must always decide upon the weight of evidence; and there is no rule (except where turpitude or illegality is in issue) which requires one contract to be proven by more or different testimony than another. The jury in each case must be satisfied that a certain contract exists; and if satisfied, that is sufficient. In *Walker vs. the York and North Midland Railway Co.*, 22 Eng. L. & Eq. 315; where a plaintiff had been notified that a company would not be responsible for certain risks, and objected to the notice and claimed that it was not binding on him, and subsequently forwarded goods by the line, it was held that it was proper to instruct a jury that they might infer an agreement on the part of the plaintiff to such terms unless a clear refusal on his part was shown, and also an acquiescence by the company in such refusal. This case is cited with approbation and given as an example in a very able essay on the theory of implied contracts, reprinted from the London Law Magazine in 4 American Law Register, p. 321.

We also think the third instruction given was erroneous. The unsigned memorandum was no contract in any sense of the term, and could

only be made available as embodied by reference in some written or parol agreement, which should adopt it. We think there was nothing in the case to found any such charge upon. There was no evidence showing, or tending to show, a written contract of the kind mentioned in that charge, and the charge was, therefore, improper, as tending to mislead the jury. *Toulmin vs. Headley*, 2 Carr. & Kirw. 157.

The principal controversy in this case, and one which goes to the entire merits, is that raised by the fourth request of the defendant below, touching the character of lake navigation, within the purview of the act of Congress entitled "An Act to limit the liability of ship owners, and for other purposes, approved March 3d, 1851"—9 Stat. U. S. 635. It is claimed by the plaintiff in error that the owners of vessels thus employed are not liable for losses on board by fire occurring without fault or negligence; while the defendants in error insist that such vessels come within the exceptions to the statute, and are in the eye of the law, engaged in "inland navigation."

The first section of the act exempts the owners "of any ship or vessel" from liability for loss or damage to goods shipped, by reason of fire happening on board, without the design or neglect of the owners, with a proviso allowing the parties to make such special contracts as they may see fit. The second section exempts the master and owners from any liability for certain valuable articles, when not made known and entered on the bill of lading truly; and in all cases limits the liability of such goods to the entered valuation. The third section limits the liability of any owner for any occurrence happening without his privity or knowledge, to the value of his interest in the ship, and freight. The fourth section provides a method of equitable apportionment, where the value of the ship and freight falls short of the losses. The fifth section makes the charterers owners during the charter, for the purposes of the act. The sixth section saves all remedies against master and crew. The seventh section contains a penalty for shipping certain inflammable and explosive articles in a general freight ship, without a written note of the articles shipped. The latter clause of that section—which is, in fact, a separate section—is as follows: "This act shall not apply to the owner or owners of any canal boat, barge, or lighter,

or to any vessel of any description whatsoever, used in rivers or inland navigation."

The question raised here is one which has never been passed upon by any court of last resort in this country, so far as we have been informed; and its importance demands a very careful examination. We propose, therefore, to view it in the light of the old law, and of the maritime legislation of England, from which the statute in question was substantially, and, in most respects, literally derived.

The policy of England has long been to aid and encourage navigation. But, so far as the liabilities of ship owners as carriers were concerned, they were left generally to be regulated by the bills of lading. From the earliest times these have exempted vessels, not only on account of the act of God, or of the public enemy, but from all losses arising from "perils of the seas," a broad and comprehensive phrase, covering most casualties not attributable to negligence of some kind in the officers or crew.—Although in some early authorities, it is clearly intimated that fire is not a peril of the seas, yet, as no case arose calling for the application of the doctrine, it seems to have been lost sight of for a long time. In 1785 the first reported decision occurred, holding inland carriers liable for loss by fire. *Forward vs. Pittard*, 1 T. R. 86. In 1786, in consequence of that decision, the statute 26 Geo. 3 ch. 86, was passed, whereby the owners of any ship or vessel were exempted from liability for loss by fire happening on board of the vessel, and their other liabilities were limited. This statute exempted no one but the owners from this particular liability, and it has been customary to exempt the master or charterers in such cases by the bill of lading. By the statute 53 Geo. 3 ch. 159, certain other qualified exemptions were made, (not referring to fire, however,) and this last act was, by its terms, not to extend to "the owners of any lighter, barge, boat or vessel, of any burden or description whatsoever, used solely in rivers or inland navigation, or any ship or vessel not duly registered according to law." It had been decided already that the previous act did not apply to lighters. *Hunter vs. McGowan*, 1 Bligh, R. 573. It was also intimated in the case of *The Dundee*, 1 Hagg. R. 113, that foreign vessels were not within these acts, which were

passed for the benefit of British commerce. The same principle was affirmed in the *Girolamo*, 3 Hagg. R. 187, and the *Carl Johann*, cited in the latter case. By 6 & 7 W. 4 ch. 61, the provisions of these acts, and of 7 Geo. 2, ch. 15, (which was an earlier act, tending in the same direction,) were declared to extend to Ireland. The object of all this legislation is said, in *Gale vs. Lawrie*, 5 B. & C. 156, to be "to encourage persons to become owners of ships."

Holland had, at an earlier day, passed similar laws for the same purpose; and by the marine ordinances of France, Book 2, title 4, art. 2, it was provided as follows: "The owners of ships shall be answerable for the deeds of the master, but shall be discharged, abandoning their ship and freight;" in this respect conforming entirely to the English statutes and the act of Congress in all cases except fire—if, indeed, that is an exception; and such is the general maritime law of Europe. 3 Kent's Com. 217, 218. It is worthy of remark that, while by the English and American statutes, a liability to the extent of his interest in the vessel and freight is retained against the owner in all other cases where there was a common law liability, the exemption against fire is absolute and entire. But while collusion might exist in other cases, fire on shipboard could very rarely occur designedly; and, inasmuch as the maritime law requires goods generally to be stowed below deck, the vessel would commonly be destroyed by any fire which destroyed her cargo, while in other cases, where damage occurs not within the legal exemptions, the vessel may, and usually does, remain undestroyed. There was no liability for fire without negligence, by the civil law. *Hunt vs. Morris*, 6 Martin's La. R. 676.

It can require but a very slight comparison between our statute of 1851 and the English acts, to ascertain that it was copied from them. The general tenor is the same, and our law is referred to this origin by Curtis, J., in the *Manufacturing Co. vs. bark Tangier*, 6 Am. Law Reg. June, 1858, where an action was brought for goods burned. The peculiar term "rivers or inland navigation," which led to some discussion before us in this case, and which Judge Conkling in 1 Ad. Jur. 209, supposes to have been a clerical mistake, is adopted literally from the act of 53 Geo. 3, above referred to.

So far, therefore, as English authorities bear upon the subject under consideration, they are worthy of attention. The same craft specifically exempted under 53 Geo. 3, are exempted by name in our statute, which contains no more designation of particular vessels. Some of the English pilot and river acts containing similar designations have passed under the observation of the courts, and may also be examined with profit.

It is quite evident from the tenor of the English legislation that the intent of the acts referred to was to strengthen their commercial marine, by encouraging persons to invest their capital without the risk of ruin from those casualties which no ordinary care on their part could prevent. Every owner could not be a master or mariner, and self-interest would always prompt ship-owners to select reliable officers and crews. There was great injustice in holding the innocent owner for matters entirely beyond his control. While, therefore, the master was still left, in most cases, liable as at common law, the owner was made exempt. But the reasons which made such a relaxation necessary or expedient in the case of vessels engaged in maritime commerce, did not apply with so much force to the excepted list. The classes named in the exception are all small vessels of burden, incapable from their nature of withstanding the perils of the sea, and never in fact exposed to them. They are not required to be navigated by expert seamen, and are never, or but rarely beyond the reach of their owners, or of succor in peril. It will be found that in the English courts, for these and other reasons, acts have been repeatedly construed with reference to one class or the other by the character of the service or the class of vessels designated, where the general terms used in addition would, in the popular sense, or with another context, embrace both classes. The case of *Hunter vs. McGowan*, already referred to, held that the act of 26 Geo. 3, was inapplicable to lighters, although the terms used were "any ship or vessel." But not only was the term "ship" the governing phrase, from which a fair intent might be drawn that "vessel" meant something of kindred employment, but the act referring to bills of lading, masters and mariners and shippers, and providing for an apportionment of loss in certain cases in a court

of equity, the inference would be almost irresistible that the act had reference to maritime business, because all the phrases are maritime. The original report of this case is not at our command, but it is frequently cited, and evidently went upon this ground. In *Blanford vs. Morrison*, 15 Q. B. R. 724, under an act which required a certain ticket or certificate for all coal delivered in London "by any lighter, vessel, barge or other craft," it was held that a coal-brig, which brought coal coastwise from Newcastle, and delivered it at the wharf, was exempted from the penalty of the law, which was held merely to apply to such vessels as were used to unload coal from others, and did not apply to vessels in which it was originally shipped. The discussion is quite full and instructive. In *Benyon vs. Creswell*, 12 Q. B. R. 899, it was held that a vessel under 15 tons burthen could not be registered, and that the registry was void. It had been registered, and the law required every transfer of property in a registered ship or vessel to be by a bill of sale reciting the registry. No ship was by law to be deemed a British ship without registry, but British built boats and vessels under 15 tons, owned and navigated by British subjects, were to be admitted to be British in all navigation "in the rivers and upon the coasts of the United Kingdom." The court held that no vessel under 15 tons could be registered at all. In *Regina vs. Reed*, 28 Eng. L. and Eq., 133, it was decided that an act forbidding any person, not a free-man, to "act as waterman or lighterman, or navigate upon the river Thames between Windsor and Ganlett Creek, any wherry, lighter, or other craft," did not extend to a steam-tug; although by *Tisdale vs. Combe*, 7 Ad. and Ell. 788, acts with a different wording, had been made applicable to passengers and freight river steamers on the Thames. The case of *Reed vs. Ingham*, 26 Eng. L. and Eq. 164, holds the same doctrine with *Regina vs. Reed*, deciding that the general words must be confined to vessels *ejusdem generis* with those named, and that a steam-tug requires different and greater skill to manage it in its occupation, from that required for wherries, lighters, or similar craft.

These cases all tend to show that such statutes, when mentioning expressly certain classes of vessels, and then using general words,

intend to apply the latter to vessels *ejusdem generis*, either of build or business, and not to extend the language beyond.

Besides the well understood meaning of "inland navigation" in England, and the natural inference to be drawn from the use of the vessels particularly named under the rules laid down in the cases cited, some light may be drawn from the course of the English courts in dealing with kindred maritime questions not immediately applicable to these statutes so far as the exceptions are concerned.

In *Battersby vs. Kirk*, 2 Bing., N. C. 584, it was held that Ireland was a place "beyond seas," in regard to the Bristol Dock acts, as it had previously been decided under the statute of limitations. In *Davison vs. McKibben*, 6 Moore 387, S. C. 3 Brod. & Bing. 112; it was held that a vessel engaged in general freighting between Belfast and London, and which at the time the question arose was proceeding down the Thames from London on her way to Belfast, with a general cargo, was neither a "coasting vessel" nor "an Irish trader, using the navigation of the river Thames as a coaster." The statute of 6 Geo. 4, c. 107, declared that thereafter all trade by sea from one part of the United Kingdom to another, or from any part of the Isle of Man to another, should be deemed to be coasting trade, in any matter relating to the trade or navigation or revenue of the realm, and all ships while employed therein should be deemed coasting ships. The customs act of 8, 9, Vic., c. 86, sec. 113, contains the same provisions. In *Shepherd vs. Hill*, 32 Eng. L. and Eq., 533, it was held that vessels running between a port in England and the channel Islands were not coasting vessels, because, although subject to Great Britain, they were no part of the realm, and were not within those acts. And where a vessel had come from Calcutta to London, and there discharged her cargo, and thence proceeded in ballast to Liverpool, it was held that the voyage from London to Liverpool was not a coasting voyage within the pilot acts. The reason why coasting vessels were exempted from employing pilots, was because the masters, from their frequent voyages, must become familiar with the navigation; and this reason did not exist in favor of an East India ship. The *Agricola*, 2 W. Rob. 10. And having employed a pilot, the ship owners were held not liable

for a collision while he was on board. In *Gatliffe vs. Bourne*, 4 Bing. N. C. 314, S. C. *Bourne vs. Gatcliffe* in Exch. Ch. 3 Mann. & Gr. 642, where goods were shipped from Dublin to London, and destroyed by fire after being landed on the wharf, it was admitted in both courts that if the fire had happened on board, the exemption of 26 Geo. 3 would have applied to save the owners from liability. The cause of action arose several years after the Irish trade had been embraced within the coasting trade. The only English case reported arising directly under the act of 26 Geo. 3, is *Morewood vs. Pollock*, 18 Eng. L. and Eq. 341, where goods were burned upon a lighter in the harbor of Mobile while in transit from the shore to an English vessel. It was urged that the lighter might be considered as constructively a part of the ship, and that the goods might thus be deemed "on board." The court, however, said "it cannot be said that the lighter was a part of the ship at the time. It belonged to other proprietors, and was employed for the particular purpose of loading by the owners of the *Barbara*. To bring a case within the act, the fire must, I think, be on board the vessel which is the property of the owners, and that was not so here. Again, the goods were not on board the ship of which the defendants were the owners." And judgment was given for the plaintiffs. This case leaves it somewhat in doubt whether if the goods had been on board of a lighter or shallop belonging to the ship, they might not have been considered on board within the acts. The case of *Johnson vs. Benson*, 1 Brod. & Bing. 454, inclines that way upon another class of liabilities under a bill of lading. Judge Curtis, in the *Manufacturing Co. vs. the bark Tangier*, above referred to, decided in conformity with *Morewood vs. Pollock* and *Gatliff vs. Bourne*, that goods burned upon a wharf were not within the act of Congress.

The whole current of decisions in the English courts tends to show that the maritime business has always been regulated as entirely distinct from any other, and that the immense traffic in the narrow seas has not been allowed to be withdrawn from its proper character as seagoing commerce. So far as the term "inland navigation" is concerned in the English acts, no serious difficulty could arise upon it. Every harbor in England is within the body of a

county, while all waters outside of harbors are part of the high seas, and under the jurisdiction of the admiralty. Lighters, barges and canal boats, are all inland craft within all the definitions. The writers on English commerce all treat of inland navigation as carried on by small or light boats, and confined to rivers, canals and streams strictly land guarded; and the decisions have invariably coupled together the class of vessels and their proper employment, with the language of the acts of Parliament applicable to them. The coasting trade is defined by statute to be a trade by sea, and embraces now, as we have seen, much business that, before the new law, was actually foreign in legal contemplation. In the United States it is equally regarded as an external sea-going trade, and this not only by acts of Congress, but by courts; and is classed separately from all internal commerce. See 2 Kent's Com. 599, 600; 10 J. R. 10, 11; *Hastings vs. Pepper*, 11 Pick. 41. See also, upon this subject, Webster's Dic. "Navigation—Inland Navigation." Rees Cyc. "Inland Navigation," "Barge," "Craft." And also "Lighter," "Barge," in any marine dictionary.

The legal and popular sense of the term "inland," when applied to navigation and commerce, differs somewhat from the geographical term as applied to bodies of water. Geographers have classed nearly all large bodies of water, except the great oceans, as "inland seas." The Mediterranean, the North Sea, the Gulf of Mexico and the Baltic are all included, geographically, within this class. Murray's Enc. of Geog. p. 188. The Baltic has been, in our day, claimed as *mare clausum* under the Danish authorities, and most nations have acquiesced in their claim of toll for entering it; yet no one would regard its navigation as in any sense inland navigation. The Mediterranean, and even the Adriatic, although geographically inland, are not so commercially. And the old English claim that all the narrow seas were close seas, and subject to British supremacy, never removed them from admiralty jurisdiction, or regarded commerce on them as inland commerce. The high seas commenced at low water mark, or at the mouths of estuaries and harbors, and nothing was inland that was beyond those lines.

It is very obvious that, inasmuch as all harbors (except, perhaps,

open roads,) are inland, the test of character could not be whether a vessel merely entered inland waters in the course of its business, but must be found in its general use.—The object of the law being to build up general maritime commerce, we have to look to that for a criterion. The vessels not embraced by the terms of the act are all of a class, peculiarly adapted to inland carriage. They are boats of burden, unsuited to the open waters. Yet it might well happen that larger vessels may be employed at times in strictly inland commerce, and if so, they would undoubtedly be held by their trade. A general rule is necessary, and that rule is easily and simply applied to the ordinary occupation. A vessel running from New York to Boston is a sea-going vessel, although both her termini are inland. A harbor lighter is not a sea-going vessel, although she may, at times, be outside of the harbor. The English courts have found no difficulty in making such applications of the law. Under their pilot acts, the questions are of frequent occurrence. The case of the *Agricola*, already referred to, and also the case of *Hunter vs. McGowan*, are of this character. In *Regina vs. Tibble*, 30 Eng. L. & Eq. 372, the question whether a vessel came within the Thames River acts, was made to depend upon her actual and habitual employment, although the term “western barge” sought to be applied to her, did apply in its popular sense, but not, as the court held, in its legal meaning. And in the United States District Court for this district, the act of Congress exempting ferry boats from the requirements applied to general passenger steamers, was construed to exempt boats built and generally used as ferry boats, although temporarily employed on a short trip off from the ferry route, but in business quite similar to ferriage. It was held the law could not have been intended to require of boats upon short routes, where passengers were on board but a brief time, and needed no extensive accommodations, the same rules which governed steamers, which went on longer trips, and where there was need of conveniences and safeguards. *U. S. vs. the Ottawa*, 1 Newberry’s Adm. R. 536. A similar rule was applied to such boats in reference to the registry and enrolling acts by the United States Court in Missouri. *United States vs. The steamboat James Morrison*, 1 Newberry’s Adm. R.

241. *United States vs. steam Ferry Boat William Pope*, Id, 256. There can never be any practical difficulty in determining whether a boat is employed in inland navigation, when the character of that navigation has been determined.

In *Wallis vs. Chesney*, 4 Am. Law Reg. 307.—The District Court of Maryland declined jurisdiction of a contract to carry coal on a canal boat, as not a maritime contract, because a large portion of the route was inland on a canal, although forty miles of carriage was on tide water. And other cases will be referred to, under another branch of the inquiry.

When an act is passed by Congress, modelled upon acts of Parliament, and containing similar qualifications, the rules which apply to one should have some, if not a controlling force, in construing the other. We have referred to the English Statutes from which this law was taken, and we now propose to refer to the commercial legislation and policy of this country to aid us in determining the legal intendment of our statute. These are safer guides than any individual opinion.

The commerce of the lakes has been regulated by acts of Congress, from the outset of our history. Prior to 1831, navigation upon them was regulated by the laws applicable on the seaboard; vessels being registered for the foreign and enrolled and licensed for the coasting trade. In 1831, as the necessities of commerce had increased, provision was made for special enrolments, which would permit vessels to be engaged in either coasting or foreign trade, and no registry was required.—This in no wise altered the navigation laws, otherwise than to favor lake navigation by opening the foreign trade to enrolled vessels. *U. S. vs. The Margaret Yates*, 22 Vt. R. 665. In 1845, Congress by statute extended the jurisdiction of admiralty over the lakes and their connecting waters—a jurisdiction intimated by the United States Supreme Court, to have existed without legislation, on account of the character of these waters. *Fitzhugh vs. the Genesee Chief*, 12 How. 443.—The registry law passed in 1850 by Congress, (9 St. 440,) requiring transfers of United States vessels to be recorded in the Custom Houses, not only applied to lake vessels, but has been held by this court to exclude

State legislation on the subject. *Robinson vs. Rice*, 3 Mich. 235. —The steamboat inspection law of 1838, for preventing accidents on the water, was made in express terms to require of lake steamers on the great lakes the same safeguards prescribed on the ocean, 5 St. 305. It is well known that the enactment of this law was procured on account of fatal accidents on Lake Erie. The steamboat law of 1852 is in terms a mere amendment of the law of 1838. The passenger steamers on the lakes are by that law left on the same footing with ocean steamers, while ferry boats, tug and tow boats, and steamboats, under 150 tons, employed on canals, were exempted entirely from the operation of the statute, and river steamboats of all sizes were partially exempted, being required to have but one life boat. 10 St. 62.

In 1851, when the act to limit the responsibility of ship owners was passed, the lake commerce had been placed by the prior legislation upon the same footing with that of the ocean. It had been recognized as subject to the same dangers and partaking of the same character. The loss of the *Lexington* by fire, on Long Island Sound, and the decision of the Supreme Court on the liability of her owners, in 6 How. R. 344, were the immediate occasion of its passage. The peculiar interior position of the Sound had, as early as 1795, caused a special enactment to be passed exempting vessels crossing from Long Island to Rhode Island from the rules applying to vessels trading between districts not adjoining—a provision similar to that which, in 1831, relieved lake commerce from like difficulties. We might well suppose that a law drawn up under such circumstances to exonerate ship owners would not stop short of providing for all cases of the same character. After the broad legislation regulating our lake trade, and considering its true character, which had certainly become somewhat prominent, we cannot be warranted in holding that a statute applying or meant to apply to the protected waters of the Sound, is inapplicable to the more exposed navigation of the lakes, on the ground that such navigation is inland, unless such a meaning is very clearly to be derived from the terms of the act of Congress. Let us, therefore, see whether there is any other, and if so, what inland navigation to which the language is applicable.

It is very clear that where commerce is confined exclusively to the territory of a single State, Congress has no control over it. *Gibbons vs. Ogden*, 9 Wheat. 1; *Milner vs. N. J. R. R. Co.*, 6 Am. Law Reg. Nov., 1857. The great canals of New York, Ohio, Indiana, Illinois, and Pennsylvania, and much interior river navigation, come under the head of local and domestic commerce, and may well have been intended in this exception. The business referred to by the District Court of Missouri in the cases cited, is of the same kind. But we have also several large rivers which are not internal as far as single States are concerned, and yet are inland in the sense of being entirely sheltered by land within the Republic, and capable of being navigated in safety by any description of boats or small craft. We have many large and important harbors where hundreds of lighters, tugs, barges, and steamers of various sizes are plying constantly in a purely inland service, but subservient to foreign trade, or that between States. We have also in several places canals entirely within single States, which are used to facilitate the passage of rivers which pass through different States, to avoid rapids and furnish means of continuous navigation. Some of these rivers are on the borders of States, and divide them. Others are within single States, but are used in commerce between different States. The Ohio and the Mississippi are boundary streams; the Missouri traverses one State and bounds others; the Delaware, the Susquehanna, the Potomac, the Tennessee and Cumberland rivers, and several others, occupy similar positions, while most of the Hudson and the whole of James river, and several other streams, such as the Sacramento and many more, are within single States, and yet open to commerce from tide water. Upon all of these streams there is important commerce within the control of Congress, and laws have been made expressly with reference to it. Canal boats have been directly exempted from marine hospital taxes, and from the ordinary fees for registry, enrolment and license; and they cannot be libelled for wages. This is the case, even when their terminus and a considerable portion of their passage, are in tide waters.—*Buckley vs. Brown*, Brightly's Dig. U. S. Laws, 305. Their crews are not entitled to marine hospital relief, *Id.* The reason of this is

very obvious, for although within congressional jurisdiction, their employment is not maritime. Boats and lighters without masts, or if masted, not decked, employed in the harbor of any town or city, are entirely exempted from the enrolment and license acts. 1 St. 317, 318. It has been held that coal barges on the Monongahela river are not within admiralty jurisdiction. *Jones vs. Cincinnati Coal Co.*, 3 Am. Law Reg. 391. The steamboat inspection act does not, as has been stated, apply to tugs, or towing boats, ferry boats, or canal steamers, and requires but a single life-boat, on the largest river steamers. And the act of Congress of 1845, which extended admiralty jurisdiction over the lakes, and straits between them, did not undertake to do so over even our largest rivers. And whether courts have done so or not, the course of legislation has certainly distinguished them.—And the decision in the case of the *Genesee Chief* does not, in fact, settle any question of jurisdiction on any waters but the lakes. In *Jones vs. The Cincinnati Coal Co.*, before cited, judge Grier denies the applicability of the doctrine to any but enrolled and licensed vessels anywhere, and in referring to that case, intimates very plainly that it was not intended to reach river navigation.

When, therefore, after providing that the owners of any ship or vessel shall be free from liability on account of fire on board, not occasioned by their design or neglect, the statute provides that “this act shall not apply to the owners of any canal boat, barge, or lighter, or to any vessel of any description whatsoever, used in rivers or inland navigation,” we may properly look to the existing legislation on such navigation, to determine the effect of the act. And when we find all the vessels named have been exempted from many of the duties and burdens common to other navigation, and when especially we find such of them as are propelled by steam, exempted wholly or partially, from the provisions devised to guard against fire, there is good reason for excluding them from some of the privileges extended by Congress to other vessels. And there is in the character of the navigation itself, much to distinguish it from lake or ocean service. There is no danger of foreign competition in such trade, unless in a very few frontier places, and not much there. The

risks to vessels, with the one exception of fire, are lighter, and when danger occurs it is with less hazard of entire destruction of the cargo. Danger from storms or wrecks on these sheltered waters is comparatively trifling. The danger from fire is greater from the light construction of the boats, and the mode of stowage, upon rivers than upon open waters. The opportunities for theft and embezzlement are infinitely greater where a safe landing can be made anywhere, and where stoppages occur every few hours, if not every few miles.—Upon the lakes cargoes are more securely stowed, and are not so easily shifted or robbed. And while the characters and risks of the various kinds of business differ so materially, there is another respect in which lake navigation greatly subserves our national policy. The merchant marine has been fostered in Great Britain and America, not only for commercial, but also for naval purposes. The mariners receive a training which enables the nation to man its navy in war with competent seamen. In this country, with a small navy, our merchant vessels as well as seamen, form important elements of strength. Not only on the ocean but also on the lakes, the same ships have been used effectively for the double purposes of war and peace. Our lake trade employs great numbers of able mariners, fitted for service in any ships or on any waters. Our river trade is mostly served by landsmen, or boatmen who would rate as such on shipboard. Not only therefore have we a large navigation, either inland, or of an inland character, which is subject to Congressional regulation, and which may easily satisfy the terms of the act, but it differs in most, if not in all respects, as much from lake, as it does from ocean business, both in its public and in its private character and policy.

But lake navigation is not inland navigation in any sense. The lakes are not within the borders of any State, and, except Lake Michigan, are not within the United States. But their border character alone would not serve to make them maritime, or change the scale of their commerce. It is their intrinsic nature and not their position alone which characterizes their commerce, but their position is also important in some views of national jurisdiction. Our courts have long since learned to disregard the exploded notion, that there is any radical difference between salt and fresh water commerce.

The old rule of the English Admiralty and its reasons are clearly stated in the sea laws, in a treatise which is appended to 2 Peters' Adm. Reports: "In *aqua dulci* a ship may become a deodand; but in the sea or in *aqua salsa*, being an arm of the sea, though it be in the body of the country, yet there can be no deodand of the ship, or any part of it, though anybody be drowned out of it, or otherwise come by their death in the ship, because on such waters ships and other vessels are subject to such dangers upon the raging waves, in respect of wind and tempest; and this diversity all our ancient lawyers do agree in." p. lxxi. This reason is a sound one, and does not depend upon the freshness of the water, but in England, generally or universally, cöexists with it. The perils which are referred to are as characteristic of the lakes as of the ocean. And in the *Genesee Chief*, case 12 How. R. 443, the Supreme Court, referring to the act of Congress of 1845, extending the Admiralty jurisdiction over the lakes, say (p. 453,) "If this law, therefore, is constitutional, it must be supported on the ground that the lakes, and navigable waters connected with them, are within the scope of admiralty and maritime jurisdiction, as known and understood in the United States when the constitution was adopted. If the meaning of these terms were now for the first time brought before this court for consideration, there could, we think, be no hesitation in saying that the lakes and their connecting waters were embraced in them. These lakes are, in truth, inland seas. Different States border on them on one side, and a foreign nation on the other.

A great and growing commerce is carried on upon them between different States and a foreign nation, which is subject to all the incidents and hazards that attend commerce on the ocean. Hostile fleets have encountered on them, and prizes been made; and every reason which existed for the grant of admiralty jurisdiction to the general government on the Atlantic seas, applies with equal force to the lakes." And the court very forcibly repudiates the supposed distinction between fresh and salt waters.

The true distinction between inland navigation and any other, as we think, must be found in its character as confined to narrow or land guarded internal waters, contradistinguished from that which is

maritime in its nature. This is the only distinction which can be drawn from the English practice; it is the only one which distinguishes the real character of the various trades, and it is the only one that has any real foundation in the risks and exigencies of commerce. Judge Grier, in the case of *Jones vs. Cincinnati Coal Co.*, above cited, uses this language, referring to coal barges—that case arising out of a collision between such vessels—“A remedy in rem against such a vessel, either for its contracts or its torts, would not only be worthless but ridiculous, and the application of the maritime law to the cargo and hands employed to navigate her, would be equally so.” “If it was unreasonable to refuse to ships and steamboats on our great lakes and rivers the benefit of the remedies afforded by courts of admiralty, it may be equally so to apply the principles and practice of the maritime law to everything that floats on a fresh water stream. Every mode of remedy and doctrine of the maritime law affecting ships and mariners, may be justly applied to ships and steamboats, but could have no application whatever to rafts and flat-boats.”

If that is inland navigation which is carried on upon inland waters in the geographical sense, we shall be led to strange results. These lakes are classed by geographers, as well as courts and mariners, as inland seas, and are not lakes at all, in the proper geographical sense, because they have a direct outlet to the ocean. 1 Murray's Encyc. of Geog., 188, 201; 3 ibd. 350. Inland seas embrace, according to the classification, the Baltic, North and Mediterranean seas, the Gulfs of Mexico and St. Lawrence, Hudson's Bay, and all other bodies of water separated from the open ocean, and yet opening into it. The Baltic, indeed, except during the prevalence of west winds is comparatively fresh, and all its saltness is derived by influx from the ocean. The same remark is applicable with still greater force to the Black Sea. The outlets to both are narrow, and controlled by single powers. But the inland waters of Europe are the seat of an extended commerce, and the ocean is but the passage way to reach it. The ports which, geographically, are on inland waters, control the commerce of the world. The Atlantic ports of Europe are comparatively insignificant beside them.

And not only is this so, but the whole admiralty law was formed and settled in those waters. The Rhodian law, the tables of Amalfi and the Consolato del Mare were the offspring and the guide of Mediterranean commerce, while the laws of Wisbuy and of the Hanse towns were devised for the Baltic. The principles thus adopted, suggested by the early exigencies of a commerce in those inland waters, which was almost insignificant compared with the lake trade, have stood the test of time throughout the whole civilized world, and every admiralty code is founded upon them. A construction which would make lake navigation inland navigation, simply because the lakes are classed by geographers as inland waters, would apply with equal force to those European waters which were the very cradle of maritime power. And to do so and yet leave the navigation of Long Island Sound out of such a classification, would be to ignore every principle of commercial usage.

Not only has the lake commerce been put upon a maritime footing by the navigation laws, and by the decisions of courts, but it, in point of fact, is in all respects as much so as that of the Baltic and Mediterranean. The vessels used in its ordinary navigation are not only capable of employment, but are actually employed in transatlantic voyages, while some, at least, of the lake fleet were brought over originally from Europe. For more than thirty years our government has been striving to secure the free navigation of the St. Lawrence for the purpose of enabling lake vessels to communicate with the ocean free from the restrictions imposed on them by the British laws. This privilege was claimed as a matter of right by the executive department in 1826, and was placed upon the ground that the right to navigate the lakes and the ocean gave a corresponding claim to navigate their connecting waters. Mr. Clay, then Secretary of State, insisted that if the St. Lawrence were regarded as a "strait," connecting navigable seas, as it ought properly to be, there would be less controversy. And he proceeds thus: "The principle on which the right to navigate straits depends, is, that they are accessorial to those seas which they unite, and the right of navigating which is not exclusive, but common to all nations; the right to navigate the seas, drawing after it that of passing the straits. The

United States and Great Britain have between them the exclusive right of navigating the lakes. The St. Lawrence connects them with the ocean. The right to navigate both (the lakes and the ocean) includes that of passing from one to the other ; through the natural link." Correspondence of 1826, 33 Niles' Register, 411 et seq.

Mr. Wheaton has expressed similar views on the right to navigate straits, (Wheat. Int. Law, 240, 250,) and applied them to the question of the Danish Sound dues—concerning the right to which our government took the same ground which had been asserted on the St. Lawrence. Both questions are now set at rest by treaty, and our vessels have the right of passage to the ocean unmolested. 10 St. U. S. 1091. (Reciprocity Treaty.)

The lake commerce being in fact maritime in its nature, and having been thus recognized as such by all the departments of the federal government, and regulated as such by congress, we cannot hesitate so to consider it in construing the act in question. And being satisfied that the inland navigation mentioned in the act cannot properly comprehend the maritime commerce of the lakes, we are of the opinion that the plaintiff in error is not liable for the property destroyed by fire on the propeller Spaulding, such fire not having been caused by design or negligence; and that the court below erred in charging the jury that the navigation of the lakes was inland navigation within the meaning of the act of Congress.

In the Supreme Court of Ohio.

ANDREW D. ROGERS, ASSIGNEE OF PETER MURRAY vs. JOHN MERAUDA,
ASSIGNEE OF DEVER AND MURRAY ET AL.

1. It is a rule of equity in the distribution of the *joint and separate* assets of insolvent partners, that the individual assets of a partner be first applied to the debts of his individual creditors, and the partnership assets first to the partnership debts—the preference of the separate creditors in the individual property resulting as a necessary correlative from the priority of the joint creditors, in the joint effects inseparable from the nature of the relation of the partners to each other.